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No. 14-915

IN THE

Supreme Court of the United States

REBECCA FRIEDRICHS, *et al.*,
Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Of Counsel:
LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

LYNN K. RHINEHART
HAROLD C. BECKER
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337
jcoppess@aflcio.org

WILLIAM LURYE
MATTHEW S. BLUMIN
1101 Seventeenth Street, NW
Washington, DC 20036

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 56 national and international labor organizations with a total membership of 12.5 million working men and women, many of whom are public employees.[1] The American Federation of State, County and Municipal Employees represents 1.6 million public employees. This case addresses the constitutionality of a public sector collective bargaining system in which employees are required to help finance the costs of negotiating and enforcing their collective bargaining agreements.

SUMMARY OF ARGUMENT

I. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court correctly began its consideration of the First Amendment implications of public sector agency shop agreements with a careful review

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[1] All parties have filed consents to the filing of *amicus* briefs. No counsel for a party authored this brief *amici curiae* in whole or in part, and no person or entity, other than the *amici*, made a monetary contribution to the preparation or submission of this brief. Laurence Gold, who appears on this brief, appeared on the respondent union's brief in opposition; since the filing of the brief in opposition, Mr. Gold has not acted as counsel for the respondent union.

of its prior decisions in *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956), and *Machinists v. Street*, 367 U.S. 740 (1961). *Hanson* and *Street* involved First Amendment challenges to the similar union shop agreements authorized by the Railway Labor Act. While the state action analysis that led the Court to perceive First Amendment implications in privately negotiated union shop agreements is now outmoded, the Court did proceed in those cases as though the First Amendment applied. *Abood*, therefore, correctly relied upon the First Amendment analysis in those cases.

Hanson and *Street* explain the practical utility of the union shop in the majority-rule, exclusive-representative collective bargaining system erected by the Railway Labor Act. *Abood* determined that the agency shop serves the same practical purposes in a similar public sector collective bargaining system. And, just so long as the agency shop is confined to requiring financial support for union activities within the collective bargaining system, *Abood* perceived no greater impairment of First Amendment rights than occurs under a government-authorized private agreement.

Abood took careful account of the unique aspects of public sector collective bargaining. To ensure that a public sector agency shop agreement is not used to compel support for political activities, the Court held that fees paid by objecting employees cannot be expended for purposes that are unrelated to collective bargaining and grievance adjustment.

The constitutional balance struck in *Abood* accords with the balancing test for considering the employment-related First Amendment claims of public em-

ployees that was established in *Pickering v. Board of Education*, 391 U.S. 563 (1968). That balancing test requires weighing the government's reasonable understanding of the employment interests served by the agency shop against the degree to which it impinges upon the First Amendment interests of covered employees.

The government's interest in bargaining with an exclusive representative chosen by a majority of the affected employees is obvious – without such a single representative bargaining would be virtually impossible. The government's interest in generally allocating the exclusive-representative's bargaining expenses to the represented group, as opposed to the government directly funding the representative, is equally obvious. The government can reasonably further conclude that allocating the bargaining expenses among all represented employees, rather than just the subset who are union members, avoids the risk of free-riders.

So long as the required financial support is confined to the exclusive representative's activities within the public employer's collective bargaining and grievance adjustment systems, the effect on employees' First Amendment rights is limited. To the extent that the funded activities involve speech at all, they involve speech occurring largely within the employer's labor relations system and not in any public forum. The employees remain free to speak out against the representative's activities, and they are not required to personally associate with those activities. All that being so, the government's reasonable understanding of the utility of the agency shop is sufficient to justify any impingement upon employees' First Amendment rights.

II. This Court has repeatedly held that employees are protected from paying full agency fees only if they express objection to so doing, a rule that derives from the line of cases concerning compelled speech. This rule was adopted in *Street* as an essential aspect of the Court's reasoning in construing the Railway Labor Act. *Street*'s strained construction of the RLA was designed to avoid a perceived constitutional problem that would arise if dissent were not protected by the statute. Accordingly, the rule is reasonably understood to reflect the constitutional requirements.

The protection of express dissent arises from the relationship of cases like *Street* and *Abood* to the more general line of compelled speech cases. Those cases hold that citizens have a First Amendment right to refrain from making government-prescribed statements. The compelled speech cases require only that the government allow the citizen to refrain from making the prescribed statement. Likewise, cases like *Street* and *Abood* require only that employees be allowed to refrain from financially supporting activities outside of the realm of collective bargaining and grievance adjustment by expressing their objection to financing such expenditures.

ARGUMENT

In *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 211 (1977), the Court considered whether "a system of union representation of local government employees" in which "[a] union and a local government employer are specifically permitted to agree to an 'agency shop' arrangement, whereby every employee represented by a union – even though not a union

member – must pay to the union, a service fee equal in amount to union dues . . . violates the constitutional rights of government employees who object to public-sector unions as such or to various union activities financed by the compulsory service fees." Answering this question, the Court first held that the system did not violate the First Amendment "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment." *Id.* at 225. However, the Court went on to also "hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative" to the extent those "expenditures [are] financed from charges, dues, or assessments paid by employees who . . . object to advancing those ideas and who are . . . coerced into doing so against their will by the threat of loss of governmental employment." *Id.* at 235-36.

The first question presented and the overwhelming bulk of the petitioners' brief concern *Abood*'s ruling that public sector agency shop arrangements are constitutional insofar as the agency fees are used by the union for the purpose of collective bargaining, contract administration and grievance adjustment. Pet. 16-60. The second question presented and the last three pages of the petitioners' brief concern *Abood*'s holding that a union may not expend agency fees on political or ideological activity unrelated to collective bargaining over a fee payer's objection. *Id.* at 60-63. We take up each question in turn.

I. *ABOOD* CORRECTLY HELD THAT PUBLIC SECTOR AGENCY SHOP ARRANGEMENTS, AS SUCH, DO NOT VIOLATE THE FIRST AMENDMENT.

In arguing that the Court should overrule *Abood*'s central holding regarding the constitutionality of public sector agency shop agreements, the petitioners place great weight on the criticisms of *Abood* voiced in *Harris v. Quinn*, 134 S.Ct. 2618 (2014). We, therefore, begin by showing that the two principal criticisms of *Abood* in the *Harris* opinion – that *Abood* placed excessive reliance upon prior decisions considering the constitutionality of union shop agreements authorized by the Railway Labor Act, *id.*, at 2632, and that *Abood* failed to appreciate the unique nature of public sector collective bargaining, *id.* at 2632-33 – are without substance.

In place of the "constitutional balance" struck in *Abood*, 431 U.S. at 229, the petitioners maintain that public sector agency shop arrangements must be subject to strict scrutiny under the First Amendment. We conclude this first section of our brief by showing that government employment practices, such as the agency shop, are subject to precisely the sort of balancing applied in *Abood*.

A. *Abood* Correctly Looked to the Court's Prior Decisions in *Hanson* and *Street* for Guidance.

Abood's "[c]onsideration of the question whether an agency-shop provision in a collective-bargaining agreement covering governmental employees is, as such, constitutionally valid . . . begin[s] with two cases

. . . that on their face go far toward resolving the issue . . . *Railway Employes' Dept. v. Hanson*, [351 U.S. 225 (1956)], and *Machinists v. Street*, 367 U.S. 740 [(1961)]." 431 U.S. at 217. *Abood* looked to *Hanson* and *Street* for "guidance regarding what the First Amendment will countenance" with respect to public sector agency shop arrangements, because those cases had considered analogous First Amendment challenges to "a governmentally authorized union-shop agreement" under the Railway Labor Act. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 515 & 516 (1991).[2]

Taken together, "*Hanson*, *Street*, and *Abood* . . . set forth a general First Amendment principle: The First Amendment permits the government to require both public sector and private sector employees who do not wish to join a union designated as the exclusive collective-bargaining representative at their unit of employment to pay that union a service fee as a condition of their continued employment." *Locke v. Karass*, 555 U.S. 207, 213 (2009). *See, e.g., Ellis v. Railway Clerks*, 466 U.S. 435, 455-56 (1984) (citing

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[2] The Railway Labor Act, like the National Labor Relations Act, "permits an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employment, but the 'membership' that may be so required has been 'whittled down to its financial core.'" *Communications Workers v. Beck*, 487 U.S.735, 745 (1988), quoting *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). *See* 29 U.S.C. § 158(a)(3); 45 U.S.C. § 152, Eleventh(a). Thus, there is no legally effective difference between a "union shop" agreement requiring "membership" and an "agency shop" agreement requiring payment of an amount equal to membership dues. *See General Motors*, 373 U.S. at 743-44.

Abood, *Street* and *Hanson* in support of the statement that "[i]t has long been settled that such interference with First Amendment rights [as caused by the union shop] is authorized by the governmental interest in industrial peace.").

1. *Hanson* and *Street* Are First Amendment Precedents.

Harris asserts that "[t]he *Abood* Court seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union" on the ground that those cases merely "held . . . that the RLA was constitutional *in its bare authorization* of union-shop contracts," while "the State of Michigan did more than simply *authorize* the imposition of an agency fee," it "actually *imposed* that fee." 134 S.Ct. at 2632 (emphasis in original; citations, brackets and quotation marks omitted). The Court's opinion in *Hanson* makes it plain that the error here is in *Harris*, not in *Abood*.

In *Hanson*, this Court reviewed a decision of the Nebraska Supreme Court holding that a private sector "union shop agreement violates the First Amendment in that it deprives the employees of their freedom of association and violates the Fifth Amendment in that it requires the members to pay for many things besides the cost of collective bargaining." 351 U.S. at 230. The *Hanson* plaintiffs "argued that the union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights." *Id.* at 236. Addressing that argument, *Hanson* held that so long as "[t]he financial support required relates . . . to

the work of the union in the realm of collective bargaining," *id.* at 235, "there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar," *id.* at 238. Thus, "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate . . . the First . . . Amendment[]." *Ibid.*

As the Court later explained, "we ruled in *Railway Employes v. Hanson*, 351 U.S. 225 (1956), that because the RLA pre-empts all state laws, the *negotiation and enforcement* of [union shop] provisions in railroad industry contracts involves 'governmental action' and is therefore subject to constitutional limitations." *Beck*, 487 U.S. at 761 (emphasis added). In other words, *Hanson* "found that the *union's implementation* of the union-shop provision amounted to state action" on the ground that "such clauses bore the imprimatur of federal law," because "the RLA . . . permits the use of union-shop clauses notwithstanding any law of any state." *White v. Communications Workers Local 13000*, 370 F.3d 346, 352 (3d Cir. 2004) (emphasis added).[3] Subjecting those contract provi-

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[3] We recognize that, in subjecting the union shop agreements authorized by the Railway Labor Act to First Amendment scrutiny on that ground, *Hanson* is out of line with the current state action analysis. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 362 (1974) (Douglas, J., dissenting) (citing *Hanson* as contrary to the majority opinion) & 366-67 (Marshall, J., dissenting) (same). Mere statutory permission is no longer deemed a sufficient ground for characterizing private conduct as state action. *Compare Public Utility Comm'n v. Pollak*, 343 U.S. 462-63 (1952), *with American Mfrs. Mut. Ins. Co. v.*

sions to constitutional scrutiny, the Court concluded that any "impingement on First Amendment rights" is "justified by the governmental interest in industrial peace." *Ellis*, 466 U.S. at 455-56.

In short, *Abood* was entirely correct in observing, "while the actions of public employers surely constitute 'state action,' the union shop, as authorized by the Railway Labor Act, also was found to result from governmental action in *Hanson*," and "[t]he plaintiffs' claims in *Hanson* failed, not because there was no governmental action, but because there was no First Amendment violation." 431 U.S. at 226. *See also id.* at 226-27 n. 23 & 233 n. 29.

2. *Abood* Correctly Treated the Discussion in *Hanson* and *Street* of the Labor Relations Interests Served by the Union Shop Agreements Authorized by the Railway Labor Act as Relevant to the Constitutionality of Public Sector Agency Shop Arrangements.

Abood recognized that "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests," because "[a]n employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative." 432 U.S. at 222. In considering the con-

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Sullivan, 526 U.S. 40, 53-54 (1999). *See Hanson*, 351 U.S. at 232 (relying on *Pollak*'s state action analysis). While the state action predicate for applying the First Amendment to RLA union shop agreements no longer holds, the First Amendment analysis in those cases is sound.

stitutionality of compelling public employees to financially support their collective bargaining representative, *Abood* correctly began from "the judgment . . . made in *Hanson* and *Street* that such interference [with First Amendment interests] as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress" in the Railway Labor Act. *Ibid.*

In drawing upon *Hanson* and *Street*'s consideration of the government interests justifying the Railway Labor Act union shop, *Abood* began by explaining the role of exclusive representation within the labor relations system established by that statute:

> "The principle of exclusive union representation, which underlies the National Labor Relations Act as well as the Railway Labor Act, is a central element in the congressional structuring of industrial relations. The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work-force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations." 431 U.S. at 220-21 (footnote and citations omitted).

Abood then went on to describe the interests served by allowing employers and unions covered by the RLA

to negotiate contract provisions that require covered employees to contribute to the costs incurred by the union in its role as exclusive representative:

> "The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. Moreover, in carrying out these duties, the union is obliged fairly and equitably to represent all employees..., union and nonunion, within the relevant unit. A union shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become free riders - to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." 431 U.S. at 221-22 (footnote, citations and quotation marks omitted).

Turning to the public sector collective bargaining system at hand, *Abood* observed that "Michigan has chosen to establish for local government units a regulatory scheme which, although not identical in every respect to the NLRA or the Railway Labor Act, is broadly modeled after federal law," and that "[t]he governmental interests advanced by the agency-shop provision in the Michigan statute are much the same

as those promoted by similar provisions in federal labor law." 431 U.S. at 223 (footnote omitted) & 224. The Court explained:

> "The confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement, are no different in kind from the evils that the exclusivity rule in the Railway Labor Act was designed to avoid. The desirability of labor peace is no less important in the public sector, nor is the risk of 'free riders' any smaller." *Id.* at 224 (citation omitted).

Noting that, "although Michigan has not adopted the federal model of labor relations in every respect, it has determined that labor stability will be served by a system of exclusive representation and the permissive use of an agency shop in public employment," *Abood* determined that "there can be no principled basis for according that decision less weight in the constitutional balance than was given in *Hanson* to the congressional judgment reflected in the Railway Labor Act." 431 U.S. at 229. With regard to the other side of the balance, the Court found that "a public employee [does not have] a weightier First Amendment interest than a private employee in not being compelled to contribute to the costs of exclusive union representation" and that "[t]he very real differences between exclusive-agent collective bargaining in the public and private sectors are not such as to work any greater infringement upon the First Amendment interests of public employees." *Id.* at 229-30. Given that assessment of the competing interests, the Court con-

cluded that "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, [*Hanson* and *Street*] appear to require validation of the agency-shop agreement before us." *Id.* at 225.

While allowing compelled financial support for union representation within the government employer's labor relations system, *Abood* drew the line at employees being "compelled to make . . . contributions for political purposes," which, the Court found, would be an unjustified "infringement of their constitutional rights." *Abood*, 431 U.S. at 234. On this ground, *Abood* concluded that the First Amendment "prohibit[s] the [state] from requiring [public employees] to contribute to the support of an ideological cause he may oppose as a condition of holding a job." *Id.* at 235. Accordingly, *Abood* held that, while "a union [may] constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative . . . , the Constitution requires . . . that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of government employment." *Id.* at 235-36.

Starting from the foundation laid in *Hanson* and *Street*, *Abood* reached the conclusion that a state's "determinat[ion] that labor stability will be served by a system of exclusive representation and the permissive use of an agency shop in public employment" is of

sufficient "weight in the constitutional balance," 431 U.S. at 229, to justify the "impact upon their First Amendment interests" of "compel[ling] employees financially to support their collective-bargaining representative," *id.* at 222. *Abood* then went on to hold that that state interest is *not* sufficient to compel financial support "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to [the union'] duties as collective-bargaining representative." *Id.* at 235. In both regards, *Abood* had good reason "to treat [*Hanson* and *Street*] as . . . reflecting the constitutional rule." *Lehnert*, 500 U.S. at 555 (Scalia, J., dissenting in part).

B. *Abood* Took Careful Account of the Unique Nature of Public Sector Collective Bargaining.

Harris maintains that "*Abood* failed to appreciate the difference between the core union speech involuntarily subsidized by dissenting public-sector employees and the core union speech involuntarily funded by their counterparts in the private sector." 134 S.Ct. at 2632. "[T]he importance of the difference between bargaining in the public and private sectors has been driven home," according to *Harris*, "[i]n the years since *Abood*, as state and local expenditures on employee wages and benefits have mushroomed." *Ibid.*

Far from ignoring the differences between private sector and public sector collective bargaining, the *Abood* opinion, 431 U.S. at 227-29, engaged in an extensive and sophisticated consideration of the differences. In this regard, *Abood* first notes that, because

"[public] services are typically not priced, . . . a public employer . . . lacks an important discipline against agreeing to increases in labor costs that in a market system would require price increases," and "[a] public-sector union is correspondingly less concerned that high prices due to costly wage demands will decrease output and hence employment." *Id.* at 227-28. *Abood* next observes that "[t]he government officials making decisions as the public 'employer' are less likely to act as a cohesive unit than are managers in private industry, in part because different levels of public authority . . . are involved, and in part because each official may respond to a distinctive political constituency." *Id.* at 228. "Finally," *Abood* notes that, because "decisionmaking by a public employer is above all a political process[,] . . . [t]hrough exercise of their political influence as part of the electorate, the employees have the opportunity to affect the decisions of government representatives who sit on the other side of the bargaining table" with the result "that permitting public employees to unionize and a union to bargain as their exclusive representative gives the employees more influence in the decisionmaking process than is possessed by employees similarly organized in the private sector." *Id.* at 228-29.

In short, *Abood* not only "appreciate[d] the difference[s]" between private sector and public sector collective bargaining, it examined in detail the policy arguments as to why extending collective bargaining rights to public sector employees might be thought to cause "state and local expenditures on employee wages and benefits [to] mushroom[]." *Harris*, 134 S.Ct. at 2632. Despite "[t]he distinctive nature of public-sector bargaining," the critical point for the *Abood*

Court, was that "Michigan . . . has determined that labor stability will be served by a system of exclusive representation and the permissive use of an agency shop in public employment" and "there can be no principled basis for according that decision less weight in the constitutional balance than was given in *Hanson* to the congressional judgment reflected in the Railway Labor Act." 431 U.S. at 229. Equally to the point, *Abood* also determined that "[t]he differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights . . . insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." *Id.* at 232.

Harris also criticizes *Abood* for failing "to have anticipated the magnitude of the practical administrative problems that would result in attempting to classify public-sector union expenditures as either 'chargeable' . . . or nonchargeable." However, *Abood* expressly forecast that there will "be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited" particularly "in the public sector [where] the line may be somewhat hazier." 431 U.S. at 236. *Harris* asserts that "the Court has struggled repeatedly with th[e] issue" of "classify[ing] public-sector union expenditures as either 'chargeable' . . . or nonchargeable." 134 S.Ct. at 2633. But of the four cases cited to support that assertion, only two – *Locke v. Karass*, *supra*, and *Lehnert v. Ferris Faculty Association*, *supra* – concern classifying public sector union expenditures, and they

both indicate a remarkable level of agreement on this issue. *Locke* was a unanimous opinion. In *Lehnert*, Justice Marshall's lone dissent concerning lobbying was the only instance of disagreement among the members of the Court over classifying activities that were uniquely related to public sector collective bargaining.[4]

C. First Amendment Scrutiny of Government Employment Policies Requires Weighing the Government's Reasonable Assessment of Its Interests Against the Policies' Impact on Employees' First Amendment Rights.

1. Government Employment Polices Are Subject to a First Amendment Balancing Test.

The petitioners assert that public sector agency fee arrangements "must satisfy exacting scrutiny," which requires that such arrangements be "narrowly tailored to the compelling interests they serve." Pet. Br. 16

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[4] *Harris* suggests that "[e]mployees who suspect that a union has improperly put certain expenses in the 'germane' category must bear a heavy burden if they wish to challenge the union's actions." 134 S.Ct. at 2633. *Harris* fails to take account of the procedural protections required by *Chicago Teachers v. Hudson*, 475 U.S. 292 (1986). Under *Hudson*, unions must give agency fee payers "sufficient information to gauge the propriety of the union's fee," *id.* at 306, and offer them "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker," *id.* at 310. At that proceeding, "the union retains the burden of proof" with respect to the propriety of the fee, *id.* at 306, and the objecting employee need do nothing more than question the union's categorization.

(capitalized heading in original) & 45. That level of scrutiny is appropriate where the government "ha[s] exercised *sovereign power*" in a manner that restricts free speech but not in "government *employment* cases." *Board of Commissioners v. Umbehr*, 518 U.S. 668, 678 (1996) (emphasis added). "[T]he balancing test from *Pickering v. Board of Ed. Of Township High School Dist. 205*, [391 U.S. 563 (1968),]" is the First Amendment standard that generally applies "where a government employer takes adverse action" that is alleged to violate "an employee['s] . . . right of free speech." *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 719 (1996), citing *Umbehr*, 518 U.S. at 675-78.

Pickering stands for the general proposition that the government "may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large" and describes "a balancing test" to be applied "[w]hen a court is required to determine the validity of such a restraint." *United States v. National Treasury Employees Union*, 513 U.S. 454, 465-66 (1995). The Court has explained the rationale for applying a balancing test in considering First Amendment challenges to government employment policies as follows:

> "Government employees' First Amendment rights depend on the balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. In striking that balance, we have concluded that the government's interest in achieving its goals as ef-

> fectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. We have, therefore, consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." *Umbehr*, 518 U.S. at 676 (citations, brackets and quotation marks omitted).

Petitioners contend that "*Pickering*'s test governs workplace discipline for employee speech" but "does not apply to the sort of categorical, prospective compulsion of political speech and association at issue here." Pet. Br. 14 & 47. However, in *Treasury Employees*, the Court applied that balancing test in considering a First Amendment challenge to "a law that broadly prohibits federal employees from accepting any compensation for making speeches or writing articles[,] . . . even when neither the subject of the speech or article nor the person or group paying for it has any connection with the employee's official duties." 513 U.S. at 457. *See also Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 564 (1973) (applying *Pickering* to a statutory restriction on employee speech). If anything, "the government's interest in achieving its goals as effectively and efficiently as possible," *Umbehr*, 518 U.S. at 676, is implicated to a greater extent where general employment policies are at issue. *See Treasury Employees*, 513 U.S. at 468 ("We normally accord a stronger presumption of validity to a congressional judgment than to an individual executive's disciplinary action.").

In short, if "*Hanson*, *Street* and *Abood*" had not al-

ready "set forth a general First Amendment principle" regarding the extent to which the government may require employees to pay a "service fee" to their union representative, *Locke*, 555 U.S. at 213, the question would be decided by precisely the sort of balancing test applied in *Abood*.

2. The State's Reasonable Determination of Its Employment Interests Justifies the Limited Infringement of First Amendment Rights Implicated by Requiring Employees to Financially Support the Collective Bargaining and Grievance-Handling Activities of Their Union Representative.

A "proper application of the *Pickering* balancing test" requires a "fact-sensitive and deferential weighing of the government's legitimate interests," giving "substantial deference . . . to the government's reasonable view of its legitimate interests." *Umbehr*, 518 U.S. at 677-78. Under that general First Amendment test, *Abood* correctly accorded significant weight to Michigan's "determin[ation] that labor stability will be served by a system of exclusive representation and the permissive use of an agency shop in public employment." 431 U.S. at 229.

To begin with, there is not the slightest doubt that the government's interest in allowing its employees to select an exclusive collective bargaining representative is sufficient to justify the association that is entailed in such a relationship. *See* Pet. Br. 12. When it comes to setting the terms and conditions of public employment, a government employer has, practically

speaking, only two choices of how to proceed. It can set the terms unilaterally and let individual employees choose between working under those terms and leaving government employment. Or the employer can set the terms through collective bargaining. If it chooses the latter course, there are strong practical reasons for allowing units of similarly situated employees to choose an exclusive representative in order to avoid "[t]he confusion and conflict that could arise if rival . . . unions, holding quite different views as to the proper [terms] each sought to obtain the employer's agreement." *Abood*, 431 U.S. at 224. *See Harris*, 134 S.Ct. at 2640 (acknowledging the government's interest in dealing with "an exclusive bargaining agent").

In *Knight v. Minnesota Community College Faculty Assn.*, 460 U.S. 1048 (1983), the Court summarily affirmed a three-judge district court decision that had "rejected [an] attack on the constitutionality of exclusive representation in bargaining over terms and conditions of employment, relying chiefly on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)." *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 278 (1984). As the Court explained, "it is rational for the State to give the exclusive representative a unique role in the 'meet and negotiate' process" leading to a collective bargaining agreement, because "[t]he goal of reaching agreement makes it imperative for an employer to have before it only one collective view of its employees when 'negotiating.' See *Abood v. Detroit Board of Education*, 431 U.S. at 224." *Id.* at 291. *See also id.* at 315-16 (Stevens, J., dissenting in part) ("It is now settled law that a public employer may negotiate only with the

elected representative of its employees, because it would be impracticable to negotiate simultaneously with rival labor unions.").

"The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones" that "often entail expenditure of much time and money." *Abood*, 431 U.S. at 221. This fact raises the practical question of how the exclusive representative will marshal the financial resources necessary for carrying out its assigned role. *Abood* determined that "the permissive use of an agency shop" was a reasonable method of financing exclusive representation. 431 U.S. at 229.[5]

While there is no First Amendment impediment to a state financially supporting the exclusive representative's collective bargaining activities, the state has "a strong interest in allocating to the members of the [bargaining unit], rather than the general public, the expense of ensuring that [the exclusive representative can carry out its assigned role]." *Harris*, 134 S.Ct. at 2644. In the first place, the bargaining unit members benefit more directly from the representation than does the general public, so it is reasonable to allocate the expense to members of the represented group. Moreover, the state could reasonably conclude that a conflict of interest might arise were the state or one of

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[5] As *Abood* was considering a "*permissive* use of an agency shop," *ibid*, it obviously did *not* rely on any "empirical assumption . . . that the principle of exclusive representation in the public sector is dependent on a union or agency shop." *Harris*, 134 S.Ct. at 2634.

its political subdivisions to assume a role in determining the resources available to the union. Indeed, Congress considered the risk of conflicting interests to be so grave that made it a crime for an employer covered by the National Labor Relations Act to provide financial support to its employees' union representative. 29 U.S.C. § 186(a).

Given that the state has a sufficient interest to justify establishing a system of collective bargaining and to justify allocating the costs of that system to the represented group, the only remaining question is whether the First Amendment requires the state to allocate the costs to only those employees in the represented group who are voluntary members of the union chosen as the exclusive representative. Precisely because "the union is obliged fairly and equitably to represent all employees..., union and nonunion, within the relevant unit," the state could reasonably conclude that requiring all represented employees to contribute "distribute[s] fairly the cost of the[representational] activities among those who benefit, and . . . counteracts the incentive that employees might otherwise have to become 'free riders' – to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Abood*, 431 U.S. at 221.

Viewing the collective bargaining system as a whole, there is no question that "[t]he representation election, the principle of exclusive representation, and the union shop together constitute an ingenious set of devices . . . for overcoming the free-rider problems that would otherwise plague the union as a large-numbers cartel." Richard A. Posner, *Economic Analysis*

of Law 430 (8th ed. 2011). *See* Richard Musgrave & Peggy Musgrave, *Public Finance in Theory and Practice* 55-56 (1976) (discussing the problem of "free riders" with respect to the provision of "social goods"). The state has a legitimate interest in adopting all three elements of this set, as *Abood* held.

While recognizing the state's legitimate interest in requiring financial support for the collective bargaining function of the exclusive representative, *Abood* also held that "compelled . . . contributions for political purposes" would be "an infringement of [employees'] constitutional rights." *Abood*, 431 U.S. at 234. Accordingly, while "a union [may] constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative . , , such expenditures [must] be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas." *Id.* at 235-36.

As a direct result of *Abood* 's limitation on the agency shop, the free speech interests of the employees who wish to refrain from financially supporting the union's collective bargaining activities are quite attenuated. The collective bargaining activities financed by agency fees concern the represented employees' terms and conditions of employment, and the communications entailed in that representation occur within the regulated negotiation and labor relations processes. Thus, the union communications that the employees are compelled to financially support typically are not made in a public forum.

"A public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy . . . is largely free to express his views, in public or private, orally or in writing." *Abood*, 431 U.S. at 230. In this very important regard, agency fee arrangements are completely unlike partisan political patronage, which causes public employees to "feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 73 (1990).

What is more, the employees are not required to take any action that would personally associate themselves with the union's activities. The agency fee is taken directly out of the employee's pay by the state without any individual action being necessary. The deduction is part of the employment conditions just as union representation is part of the employment conditions. Thus, the deduction causes no more than a slight increase in the level of the employee's association with the union from that entailed in the union's status as exclusive collective bargaining representative.

The free speech interests implicated by the use of agency fees to finance collective bargaining are much narrower than the free speech interests at issue in *United States v. National Treasury Employees Union*, *supra*, the one case cited by the petitioners in their very cursory attempt to show that "'agency fees' flunk *Pickering*." Pet. Br. 49. *See id.* at 49-51. *Treasury Employees* concerned "a law that broadly prohibits federal employees from accepting any

compensation for making speeches or writing articles[,] . . . even when neither the subject of the speech or article nor the person or group paying for it has any connection with the employee's official duties." 513 U.S. at 457. "The speeches and articles for which [the covered employees] received compensation in the past were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their Government employment." *Id.* at 466. The Court concluded that, "[t]he sweep of [the law] makes the Government's burden heavy" and that the proffered government interests did not justify the "wholesale deterrent to a broad category of expression by a massive number of potential speakers." *Id.* at 466-67. The communications supported by agency fees are rarely addressed to a public audience, rather, they are addressed almost exclusively to the government employer and relate exclusively to government employment. In other words, the speech involved in collective bargaining and grievance adjustment is the opposite of the speech at issue in *Treasury Employees* in every pertinent respect.

"[T]he State's burden in justifying a particular [employment practice] varies depending upon the nature of the employee's expression." *Connick v. Myers*, 461 U.S. 138, 150 (1983). The state's "legitimate interests as [employer], deferentially viewed, outweigh the free speech interests at stake," *Umbehr*, 518 U.S. at 685, with regard to compelled financial support of collective bargaining and grievance adjustment. The constitutional balance struck in *Abood* is thus completely consistent with the basic First Amendment law established by *Pickering*.

II. *ABOOD* CORRECTLY HELD THAT THE FIRST AMENDMENT PROHIBITS THE EXPENDITURE OF AGENCY FEES ON NONCHARGEABLE ACTIVITIES ONLY OVER THE FEE PAYER'S OBJECTION.

In establishing "[t]he constitutional floor for unions' collection and spending of agency fees," this Court's "cases have repeatedly invoked the following proposition: Dissent is not to be presumed – it must affirmatively be made known to the union by the dissenting employee." *Davenport v. Washington Education Association*, 551 U.S. 177, 185 (2007) (citations, quotation marks and brackets omitted). The petitioners contend that the constitution requires the opposite, i.e., that agency fee payers be presumed to dissent to the collection and expenditure of agency fees on political and ideological activities unrelated to collective bargaining. Careful consideration of this Court's decisions demonstrates that this is not so.

A. Protection of Expressed Dissent Was Essential to *Street*'s Limiting Construction of the Railway Labor Act.

The proposition that "dissent is not to be presumed – it must affirmatively be made known to the union by the dissenting employee," *Street*, 367 U.S. at 774, was an essential aspect of *Street*'s "hold[ing] . . . that [RLA] § 2, Eleventh is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes," *id.*, at 768-69, an interpretation that the Court adopted in order to avoid serious First Amendment questions. *See Air Line Pilots v. Miller*, 523 U.S. 866, 87 (1998) ("To avoid constitutional questions . . . , we

have held that costs unrelated to those representative duties may not be imposed on objecting employees."). "[T]he *Street* Court construed the RLA to deny unions the authority to expend *dissenters'* funds in support of political causes to which those employees *objected*" based on the Court's express "[r]ecogni[tion] that, in enacting § 2 Eleventh of the RLA, Congress sought to protect the expressive freedom of *dissenting* employees while promoting collective representation," *Lehnert*, 500 U.S. at 515 (emphasis added). Thus, protection of dissent – "protection for an employee who disagreed with union policies or leadership," *Street*, 367 U.S. at 765 – was an essential aspect of *Street*'s construction of the RLA.

Knox v. Service Employees Local 1000, 132 S.Ct. 2277, 2290 (2012), characterizes this aspect of *Street* as "dicta" and nothing more than an "offhand remark" made "in passing." Those statements concerning *Street* are themselves dicta, as *Knox* did not concern the interpretation of the Railway Labor Act.[6] They are also completely inaccurate.

The language of RLA § 2, Eleventh contains not the slightest suggestion that employees covered by a permitted union shop agreement can opt out of paying the normal union dues, fees and assessments. To the contrary, the statute states that covered employers and unions may enter into agreements requiring

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[6] *Knox* addressed "whether the First Amendment allows a public-sector union to require objecting nonmembers to pay a special fee for the purpose of financing the union's political and ideological activities." 132 S.Ct. at 2284. In deciding that question, the Court expressly refrained from reconsidering its prior decisions regarding the expression of dissent. *Id.* at 2289.

employees to "become members of the labor organization representing their class or craft" by "tender[ing] the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership." 45 U.S.C. § 152, Eleventh(a). By providing that all covered employees must "tender the periodic dues, initiation fees, and assessments . . . *uniformly* required as a condition of acquiring or retaining membership" and excluding from the required exactions only "fines and penalties," the terms of § 2, Eleventh make it exceedingly clear that the amount that must be tendered is the full amount an employee would have to pay to become and remain a member of the union.

Street's "hold[ing] . . . that § 2, Eleventh is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes he opposes," 367 U.S. at 768-69, is the culmination of a long section of the opinion headed, "THE SAFEGUARDING OF RIGHTS OF DISSENT," *id.* at 765. *See id.* at 765-70. From a careful examination of § 2, Eleventh's legislative history, *Street* found that "[a] congressional concern over possible impingement on the interests of individual dissenters from union policies is . . . discernible." *Id.* at 766. That background allowed the Court to conclude that "Congress incorporated safeguards in the statute to protect dissenters' interests." *Id.* at 765. On that basis, the Court asserted that it was only "respect[ing] this congressional purpose when [it] construe[d] § 2, Eleventh as not vesting the unions with unlimited power to spend exacted money" and as "denying the unions the right, over the employee's objection, to use

his money to support political causes which he opposes." *Id.* 768.[7]

The proposition that "dissent is not to be presumed – it must affirmatively be made known to the union by the dissenting employee" follows directly from the Court's understanding that "[t]he safeguards of § 2, Eleventh were added for the protection of dissenters' interests." *Street*, 367 U.S. at 774. It also follows that "an employee who makes no complaint of the use of his money for . . . political uses" has no claim against the union for making such expenditures. *Ibid.*

Street's holding that "dissent is not to be presumed," 367 U.S. at 774, was, to be sure, a construction of the Railway Labor Act. However, as the *Abood* Court noted, "*Street* embraced an interpretation of the Railway Labor Act not without its difficulties, see 367 U.S. at 784-786 (Black, J., dissenting); *id.* at 799-803 (Frankfurter, J., dissenting), precisely to avoid facing the constitutional issues presented by the use of union-shop dues for political and ideological purposes unrelated to collective bargaining, *id.* at 749-50." *Abood*, 431 U.S. at 232. *Street* avoided addressing "the issue of the use of exacted money for political causes which were opposed by the employees," 367 U.S. at 749,

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[7] The Court has found *Street*'s construction of RLA § 2, Eleventh to be "controlling" with regard to the construction of § 8(a)(3) of the National Labor Relations Act. *Communications Workers v. Beck*, 487 U.S. 735, 745 (1988). Accordingly, in *Beck*, the Court "held that § 8(a)(3) allows unions to collect and expend funds over the objection of nonmembers only to the extent they are used for collective bargaining, contract administration, and grievance adjustment activities." *Marquez v. Screen Actors Guild*, 525 U.S. 33, 36 (1998).

through a "construction" of the Railway Labor Act "which denies the authority to a union, over the employee's objection, to spend his money for political causes which he opposes," *id.* at 750. The *Abood* Court thus had good grounds for concluding that *Street*'s construction of the Railway Labor Act – including the "proposition: '[D]issent is not to be presumed'" – established "[t]he constitutional floor for unions' collection and spending of agency fees." *Davenport*, 551 U.S. at 185.

B. Protection of Express Dissent is Consistent with the First Amendment Limitations on Compelled Speech.

It follows from basic First Amendment principles, as well as from the holding of *Street*, that nothing more is required than allowing a fee payer to avoid subsidizing nonrepresentational union expenditures by expressing dissent.

The basic constitutional analysis has been succinctly summarized by the Court as follows:

> "Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views, see *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), or from compelling certain individuals to pay subsidies for speech to which they object. See *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990)." *U.S. Dept. of Agriculture v. United Foods, Inc.*, 533 U.S. 405, 410 (2001).

This Court has elaborated on the relationship between the "compelled-subsidy" cases and the "compelled-speech" cases, as follows:

> "We have sustained First Amendment challenges to allegedly compelled expression in two categories of cases: true 'compelled-speech' cases, in which an individual is obliged personally to express a message he disagrees with, imposed by the government; and 'compelled-subsidy' cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity. * * *
>
> "We first invalidated an outright compulsion of speech in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943). The State required every schoolchild to recite the Pledge of Allegiance while saluting the American flag, on pain of expulsion from the public schools. We held that the First Amendment does not 'leave it open to public authorities to compel [a person] to utter' a message with which he does not agree. *Id.*, at 634. Likewise, in *Wooley v. Maynard*, 430 U.S. 705 (1977), we held that requiring a New Hampshire couple to bear the State's motto, 'Live Free or Die,' on their cars' license plates was an impermissible compulsion of expression. Obliging people to 'use their private property as a "mobile billboard" for the State's ideological message' amounted to impermissible compelled expression. *Id.*, at 715.
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> "The reasoning of these compelled-speech cases has been carried over to certain instances in which individuals are compelled not to speak, but to subsidize a private message with which they disagree.

> Thus, although we have upheld state-imposed requirements that lawyers be members of the state bar and pay its annual dues, and that public school teachers either join the labor union representing their 'shop' or pay 'service fees' equal to the union dues, we have invalidated the use of the compulsory fees to fund speech on political matters. See *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977). Bar or union speech with such content, we held, was not germane to the regulatory interests that justified compelled membership, and accordingly, making those who disagreed with it pay for it violated the First Amendment. See *Keller*, supra, at 15-16; *Abood*, supra, at 234-235." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557-558 (2005).

It goes without saying that for "an individual [to be] obliged personally to express a message he disagrees with, imposed by the government," is a greater impingement upon free speech interests than for "an individual [to be] required by the government to subsidize a message he disagrees with, expressed by a private entity." *Johanns*, 544 U.S. at 557. Yet, there is nothing in *Barnette* to suggest that the First Amendment requires a school teacher to say, "All who feel like it, may now say the Pledge of Allegiance," instead of simply, "All rise for the Pledge of Allegiance." Nor is there anything in *Wooley* to suggest that the State of New Hampshire must leave a blank spot on its license plates where the state motto may be affixed by automobile owners who wish to do so. Rather, all that is required in both circumstances is that those who wish to refrain from uttering the prescribed message be given a reasonable opportunity to refrain from

doing so. The same principle applies in situations where the government requires the payment of fees to subsidize the activities of a private organization, such as a labor union or a bar association. So long as the fee payer is given a reasonable opportunity to express dissent and refrain from subsidizing the nonchargeable activity, the First Amendment is satisfied, as *Street* and *Abood* both held.

The burden on the petitioners of expressing their dissent to the payment of agency fee for purposes other than collective bargaining is much less than that faced by a school child whose religious principles require her to refrain from pleading allegiance to the flag of the United States or a resident of New Hampshire who wishes to refrain from displaying the state motto on his automobile. Just so long as the petitioners are accorded the opportunity to effectively dissent, their First Amendment rights have been satisfied.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Of Counsel:
LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

LYNN K. RHINEHART
HAROLD C. BECKER
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337
jcoppess@aflcio.org

WILLIAM LURYE
MATTHEW S. BLUMIN
1101 Seventeenth Street, NW
Washington, DC 20036